IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.726 OF 1998

In the matter of Section 439 of the Companies Act, 1956 ;

And

In the matter of Motwani Builders Pvt.Ltd., having their registered office at 501, Tulsiani Chambers, Nariman Point, Mumbai-21.

M/s.Kunal & Co.)
)
a partnership firm duly registered)
under the provisions of the Indian)
Partnership Act, carrying on)
business at 66, Mittal Tower, 210,)
Nariman Point, Mumbai-400 021.)..Petitioner

A N D

COMPANY PETITION NO.171 OF 2000

In the matter of Section 439 of the Companies Act, 1956 ;

And

In the matter of Motwani Builders Pvt.Ltd., having their registered office at 501, Tulsiani Chambers, Nariman Point, Mumbai-21.

Shri Tarachand H.Khanchandani)
)
of Bombay Indian Inhabitant)
residing at Rajni Gandha Building)
3rd Floor, Talmiky Road, Santacruz)
(West), Mumbai-400 054)..Petitioner

Mr.B.K.Bali with Ms.Payal Kotwani i/by M/s.Thakkar & Bali for the petitioners.

Shri Doctor, Sr.Counsel with J.P.Sen i/by F.Rashmikant for respondents.

Shri P.N.Vora i/by Pramodkumar & Co. for the petitioner in C.P.No.171/2000.

Mr.J.P.Sen with Mr.S.H.Doctor i/by M/s.F.& Rashmikant & Co. for respondents.

Coram : R.S.Mohite,J

Date : 29.06.2007.

Judgment :-

1. Since both these Company Petitions arise out of the same set of facts and seek winding up of the same Company i.e. Motwani Builders Pvt.Ltd., (hereinafter referred to as the 'Company') both are being disposed off by this common judgment and order.

2. The relevant facts and events pertaining to Company Petition No.726 of 1998 are as under :-

(a) The petition was filed by the petitioner M/s.Kunal & Co. which is a registered partnership firm (hereinafter referred to as 'Kunal') on 3rd September 1998 seeking the winding up of the Company and the appointment of the Official Liquidator as Liquidator of the Company. In the petition, it was averred that the Company was incorporated on 17.2.1982 under the Companies Act, 1956 as a private company, limited by shares. The registered office

of the Company was at Mumbai. The authorised share capital was Rs.3,00,000/- divided into 30,000 equity shares of Rs.10/- each. The issued, subscribed and paid up share capital of the Company was Rs.2,07,000/- divided into 20,700 equity shares of Rs.10/- each, fully paid up. The objects of the Company as set out in the Memorandum of Association were to carry on business, own, buy, sell, possess, develop, construct, demolish, rebuild or otherwise deal in lands and buildings and to do other ancillary things in relation to the aforesaid objects as set out in detail in the Memorandum of Association. It was contended that the Company was indebted to Kunal for a sum of Rs.3,91,54,538/- being the balance of the amount lent and advanced by the petitioner to the Company alongwith interest due at the rate of 18% p.a. with quarterly rests as per an agreement and in accordance with the particulars of claim annexed and marked at Exhibit-A to the petition.

(b) It was averred in the petition that in or about March-1994 the Company through its Director and a Shareholder Mr.K.K.Motwani approached the petitioner and requested for grant of a temporary loan to enable the Company to make payment to the appropriate authority of the Income-tax department from whom the Company was to purchase a property situated at Worli for development in an auction sale

for a consideration of Rs.21,75,00,000/-. The Company agreed to pay interest at the rate of 18% p.a. with quarterely rests on the amount which may be lent and advanced. The petitioner therefore, lent and advanced to the Company an amount aggregating to Rs.3,54,51,000/- during the period between February to March-1994. This amount lent by the petitioner was duly received by the Company and the Company agreed to repay the same alongwith interest thereon at the rate of 18% p.a. with quarterely rests.

(c) The company thereafter, alongwith its forwarding letter dated 7.6.1994 sent to the petitioner a cheque for an amount of Rs.39,40,000/- towards repayment of a part of the loan and another cheque for Rs.9,31,707/- towards the interest due upto 31.5.1994 at the rate of 18% p.a. as agreed. A copy of the said letter dated 7.6.1994 was annexed at Exhibit-B to the petition.

(d) The company thereafter paid further amounts towards repayment of the loan by a cheque dated 8.7.1994 for Rs.39,40,000/-, a cheque dated 4.8.1994 for Rs.39,71,000/- and a cheque dated 8.2.1995 for Rs.20,00,000/-. The company also paid to the petitioner interest due on the amount of the loan upto 31.12.1994. The company thereafter failed to pay the balance amount of the loan or the interest

due thereon to the petitioner. That from the certificate issued by the Company, it was evident that the Company paid income tax deducted from the interest accrued and payable to the petitioner for the years ended on 31.3.1995 and 31.3.1996 although the amount of the said interest accrued had not been paid by the Company to the petitioner. That in the circumstances, a sum of Rs.3,64,22,825/- remained due and payable by the Company to the petitioner as on 31.3.1998 with further interest thereon at the rate of 18% p.a. with quarterly rests from 1.4.1998 till payment.

(e) It was averred that the Company had admitted and acknowledged its liability to the petitioner and also confirmed the correctness of the amounts due to the petitioner by executing confirmation of the accounts as on 31.3.1995, a copy of which confirmation was annexed at Exhibit-C to the petition. That the company had also admitted and confirmed the correctness of the interest accrued on the principal amount upto 31.3.1996 vide its letter dated 27.3.1996, a copy of which was annexed at Exhibit-D to the petition. The company has also confirmed the correctness of the balance due to the petitioner as on 30.9.1996 by executing a confirmation of the accounts, a copy of which was annexed at Exhibit-E to the petition. Lastly, the company had further admitted and acknowledged its

liability to the petitioner in its accounts and the balance sheet for the year ended 31.3.1996. It was contended that in view of these admissions there was no dispute whatsoever about the liability of the Company to the petitioner.

(f) That since the Company failed and neglected to make payment to the petitioner after February-1995 either towards repayment of the principal or the interest due, the petitioner by its Advocate's letter dated 20.07.1998, recorded some of the facts mentioned above and demanded payment of the amount due to the petitioner. The said letter was duly served upon the Company by hand delivery on 22.7.1998. The company however, failed and neglected to comply with the demand made by the petitioner or to respond to the said letter. In the circumstances, a 2nd letter addressed by the Advocate for the petitioner dated 24.8.1998, recorded these facts and notified that the petitioner was proceeding with the filing of the winding up petition. The company however, failed and neglected to pay the amount due to the petitioner or any part thereof. The aforesaid letters dated 20.7.1998 and 24.8.1998 were annexed at Exhibit-F1 and Exhibit-F2 to the petition. A contention was thus raised in the petition that the Company was unable to pay its debts and was

therefore liable to be wound up under the provisions of the Companies Act.

(g) It was then averred in the petition that the petitioner was a shareholder of the Company holding 3800 equity shares of Rs.10/- each. In his capacity as a member and a shareholder of the Company the petitioner was entitled to receive notices of the Annual General Meetings of the Company as also the copies of the annual accounts of the Company every year. The petitioner had however, till date, not received any notice from the Company about the Annual General Meeting, if any, held by it. The petitioner was therefore, not aware of the present status or development of the said property purchased at Worli or any other activities, if any, carried on by the Company. In the circumstances, the petitioner had lost confidence in the present management of the Company and was therefore, entitled to seek winding up of the Company. The petitioner averred that it was therefore, just and equitable to wind up the Company in the interest of its creditors and shareholders. The petitioner sought interim relief of appointment of the Official Liquidator as a provisional liquidator so as to preserve and protect the assets of the Company.

(h) that after filing of the petition and the service of the same upon the Company, an

affidavit-in-reply affirmed by the managing director of the Company Mr.Kanayo Khubchand Motwani duly affirmed on 18.12.1998 came to be filed in the petition. It was contended on behalf of the Company that the petition filed by the petitioner was malafide, induced by ulterior motive and was an abuse of the process of the Court. The petitioner had deliberately suppressed true facts, papers and documents on record with a view to seeking quick remedy in an inappropriate forum. The Company's relation with the petitioner was not that of borrower and lender. The petitioner entered into a business deal as one of the nominees of Shri Ramesh T.Khanchandani in pursuance of the agreement dated 28.3.1994 entered into between (i) Shri K.K.Motwani, the deponent herein, (ii) Shri Manohar T.Makhija and (iii) Shri Ramesh T.Khanchandani. The said Mr.Makhija and Mr.Khanchandani who were non resident Indians (NRIs) were introduced to the deponent by one Shri Sunil Mirpuri who was an agent and broker in real estates. That the Company was incorporated on 17.2.1982 by the deponent, his brother and a close friend with an authorised capital of Rs.3,00,000/- for development and construction business. Though there were several business proposals, none had materialised for want of an appropriate land site. On 19.1.1994 an appropriate authority of the income-tax department held an auction of a property at Worli and the Company made

a successful bid at a price of Rs.21,75,00,000/-. The Company paid Rs.10/- lacs as earnest money to the appropriate authority. At the time of the bid, there were great potentialities and bright prospects for development and construction business. Hence, after the land was acquired, the aforesaid NRIs through the good offices of the said Shri Sunil Mirpuri, the real estate agent and broker, showed great interest in the project because of the prime location of the land which was acquired by the Company from the income-tax department in an auction sale and because such property was presumed to be free from any encumbrances and/or hassles of defective title. Accordingly, an agreement dated 28.3.1994 was entered into between Shri K.K.Motwani and the aforesaid two NRIs namely Shri Manohar T.Makhija and Shri Ramesh T.Khanchandani and the agreement provided that they shall jointly participate in the said Company to carry on the development of the said property at Worli, Mumbai and that the balance equity shares of the Company to the extent of 29,700 shares (30,000 equity shares of Rs.10/- each less 300 shares issued at the relevant time) were to be issued to these 3 persons and their nominees, so that after such issue their holding in the entire capital of Rs.3,00,000/- shall be in the ratio of 34:33:33 respectively. A copy of this agreement dated 28.3.1994 was annexed at Exhibit-A to the reply. It was contended that paragraph-2 of

the agreement provided that Shri Manohar T.Makhija shall be the Chairman, Shri K.K.Motwani shall be the Managing Director and Shri Ramesh T.Khanchandani shall be the Director of the Company. In paragraph-4 it was provided that the parties to the said agreement shall contribute or arrange such loans and funds as may be required for the purpose of paying for the property, stamp duty and other expenses and development and construction cost. In paragraph-8 it was provided that for the purpose of development of the said property, all major decisions such as appointment of Architects and sales policy shall be taken unanimously. However, other decisions shall be taken by the Managing Director who shall be in-charge of the construction. In paragraph-9 it was provided that Shri K.K.Motwani and his nominees shall bring in loans and deposits of Rs.6/- crores and interest @ 18% per annum will be paid by the Company thereon. That, Shri Manohar T.Makhija and his nominees shall bring in loans and deposits of Rs.9/- crores and interest @ 18% per annum will be paid by the Company thereon. That Shri Ramesh T.Khanchandani and his nominees shall bring in loans and deposits of Rs.9/- crores and interest @ 18% per annum will be paid by the Company thereon. It was submitted that the petitioner was a nominee of the aforesaid Shri Ramesh T.Khanchandani and held 13% i.e. 3,900 shares out of 33% i.e. 9,900 shares allotted to Khanchandani’s group. The

petitioner initially paid an amount of Rs.3,54,51,000/- which was equivalent to 13/33 of Rs.9,00,00,000/- as its contribution by way of loans and deposit to participate in the Worli project as a nominee of the said Khanchandani group. It was mutually agreed that the payments of such interest to the participants was nothing but an advance against their final profits and was adjustable against their shares in the final profits to be distributed equally in the ratio of 34:33:33 on completion of the said Worli project. That neither the K.K.Motwani group nor the Manohar T.Makhija group took any interest at any time on the advances made by them to the Company and therefore, subsequently such periodical payments of interest earlier made to Shri Ramesh T.Khanchandani and his nominees including the petitioner were also stopped.

(i) It was contended that the Worli project could not take of because of various objections raised from time to time by local government authorities. Initially objection was raised against sanctioning of the plans due to Coastal Zone Regulations. It took nearly 2 years to resolve this problem and it was resolved only after the Chief Commissioner (Investment & NRIs) New Delhi intervened in a complaint made by the Indian Chamber of Commerce, Hongkong. Later, the Municipal Corporation of Gr.Mumbai (MCGM) raised another objection that the

plot of land at Worli, Mumbai, was given on lease by them to R.M.D.C. Press (P) Ltd., and that the same belonged to them. That according to the Corporation the appropriate authority of the income tax department which acquired the said plot from the said R.M.D.C. Press (P) Ltd., under the premptive provisions of the Income tax Act was required to pay to the Corporation premium at 7% of the purchase price of Rs.21.75 crores which, as per the Corporation's calculations would amount to Rs.1.52 crores. The appropriate authority of the income tax department as per its letter dated 2.9.1997 addressed to the Joint Municipal Commissioner, vide para-10 thereof, contested this claim. A copy of this letter was annexed at Exhibit-B to the reply. That this dispute was between the Corporation and the income tax department and that the Company did not directly come into the picture. However, the plot was purchased from the Central Government in public auction, the Company had always felt assured about the clear marketable title of the said land. The terms of auction sale did not contain any condition about the premium payable to the Corporation and therefore, the Company was not liable to be fastened with any such unknown and undeclared liabilities. That the dispute between the Corporation and the income tax department remained unresolved till the date of the filing of the reply.

(j) That as a result of undue delay in having the land conveyed to the Company and consequent delays in granting approval of the plans, the Company had taken up the matter with the Finance Minister of India for recission of the contract of purchase of plot by the Company in the public auction held by the appropriate authority of the income tax department and has claimed refund of purchase price together with interest and damages for losses suffered by the Company. The Finance Minister had sought the opinion of the Attorney General of India in this respect to enable him to take a suitable decision. That the Company was expecting a disposal of its complaint with the Finance Minister within next 3 to 4 months. A copy of this representation dated 10.6.1998 alongwith its annexures was annexed at Exhibit-C to the reply.

(k) It was contended that the Company was legally obliged to refund in priority, the deposits of the prospective flat owners who have booked the flats in the proposed building to be constructed on the said plot of land at Worli, Mumbai. The petitioner as a nominee of Shri Ramesh T.Khanchandani group was duly bound to repay to the Company the amount paid to it in advance by way of interest against the final profits of the project to enable the Company to return the deposits of the prospective flat owners.

That the Directors' reports from time to time had dwelt upon all the problems, obstacles, hurdles, hassles and issues encountered by the Company and the petitioner was well aware of the same. That the petitioner as a nominee of Shri Ramesh T.Khanchandani was fully briefed about the day to day developments, matters and issues faced by the Company as the said Shri Ramesh T.Khanchandani was one of the directors of the Company and the Chairman Shri Manohar T.Makhija and Managing Director Shri K.K.Motwani were regularly in touch with him through fax, informal meetings whenever he came to Mumbai as also through notices for the Directors' meetings. It was contended that neither Shri Ramesh T.Khanchandani nor any other shareholder or Director had raised any dispute of the nature raised by the petitioner.

(l) It was contended that the petitioner's claim for the payment of interest only to the petitioner in preference to the depositors and lenders of other groups as also Shri Ramesh T.Khanchandani himself to whose group the petitioner belonged as a nominee was unjust complex and of triable nature as such interest was in any case adjustable against the final profits, if any, of the project. It was contended that when the real estate market had totally crashed, plans for construction of the Worli property not yet approved for the reasons aforesaid

and the Company's claim against the income tax department for interest and damages etc. for the delays, not of Company's making, still to be resolved, it was neither justified nor possible for the Company to make any payment to the petitioner in respect of its loan/deposits in the nature of its contribution for participating in the project as also the interest in lieu of final profits in preference not only to interest of other groups but even the proposed flat owners. It was contended that the main asset of the Company was the said plot of land at Worli, Mumbai and the title of this land was shrouded in the mystery of bureaucratic ways of working. The said land was not capable of being transferred unless the dispute between the income tax department and the Corporation was resolved and the land was duly conveyed to the Company. That the Company undertook that it will not transfer and/or mortgage the said land to any outside party, save and except to surrender the same to the income tax department against return of monies paid to it by the Company as also compensation in the nature of loss of interest and damages suffered by the Company because of breach of the terms and conditions of the auction sale. It was contended that the presentation of the winding up petition by the petitioner was a device to pressurise the Company to submit to an unjust claim and that this Court was not the forum for resolving various complex and

complicated questions like the nature of contributions by the participants, adjustment of interest against future and that these issues required thorough investigation. That therefore, the Court could not be required to investigate several complex facts and evidences in depth. That the amount received by the Company from the petitioner and other participants were for the purpose of purchase and development of the said plot of land at Worli and the main asset of the Company was the said plot of land that was very much in existence. There were no business losses as such suffered by the Company and therefore, it was not possible to contend that the Company has lost its substratum. Therefore, there was no question of winding up the Company.

(m) It was averred that on receipt of notice from the petitioner's Advocate, reference was immediately made to Shri Sunil Mirpuri and Shri Sunil Mirpuri had assured that he would convince the petitioner against filing any winding up petition because the management of the Company was strenuously working to save the financial interests of the Company as stated above. During this time the deponent had also to make trips to Delhi in connection with the follow up of the matter lying with the Finance Minister and hence the notice of the petitioner's Advocate remained to be replied which unfortunately

resulted in exparte acceptance of the petition by this Court.

(n) In view of what was stated in the reply, it was denied that the Company was liable to pay the amount claimed and that it was just and equitable that the Company should be wound up. That Kunal was a nominee of Shri Ramesh T.Khanchandani group and one of the participants in the said project. The amount advanced by it to the Company was agreed contribution simpliciter and not the amount allegedly lent and advanced by the petitioner as held out by it. It was denied that the petitioner was not given copies of annual accounts, directors' and auditors' reports regularly and that therefore, the petitioner was unaware about the present status of development of Worli property as alleged by the petitioner. It was contended that Kunal never made any such grievance prior to the filing of the petition. That the allegations made by the petitioner were absurd and motivated. It was further contended that the order of winding up was not only injurious to the interests of the proposed flat owners, the shareholders and business participants but in the aforesaid circumstances, when the matter was lying for decision with the Finance Minister, it will not be beneficial even in the interest of the petitioner itself. On behalf of the Company, leave was sought to file an additional

affidavit supplementing the Company's say in the matter if there were any further developments therein including the Company's complaint lying for disposal with the Finance Minister. It was therefore, prayed that the petition of the petitioner was not liable to be admitted and deserved to be dismissed in limine with costs.

(o) On 1.2.1999 an affidavit in rejoinder was affirmed by Mr.Shreepal S. Dalal, a partner of Kunal. It was contended in this rejoinder that the Company had admitted that monies were due and payable to the petitioner but had raised a false and bogus story contrary to the documents on record and that the defence was an after-thought. Neither Kunal nor the Company were a party to the alleged agreement or arrangement. The alleged agreement or arrangement was not binding on the petitioner and could not in any manner affect the liability of the Company to Kunal. That the issues raised were not irrelevant and it was not a case of disputed liability. It was denied that the petition was malafide. It was denied that the petitioner has deliberately suppressed any facts, papers or documents on record with a view to seeking a quick remedy in an inappropriate forum. It was denied that the forum was inappropriate and if at all there was anybody misleading the court, it was the Company who has put forward a completely false, dishonest,

bogus and irrelevant case in order to dishonestly evades its liability and to confuse the Court. It was denied that the petitioner has entered into a business deal as one of the nominees of Shri Ramesh Khanchandani in pursuance of the agreement dated 28.3.1994 or otherwise. That neither the petitioner nor the Company was a party to the said agreement dated 28.3.1994 and therefore, said agreement was irrelevant. It was contended that Kunal had lent money to the Company and had nothing to do with the business deal or any agreement entered into between Motwani, Makhija and Khanchandani. It was denied that the Company's relation with the petitioner was not that of a borrower and lender. That the documents on record clearly proved beyond doubt that relationship of the petitioner and Company was that of a borrower and lender. It was contended that the agreement dated 28.3.1994 had no relevance to the petition and deliberately sought to be introduced to confuse the matter. That the terms of the said agreement were neither binding on the petitioner nor the company, nor did it any way affects the liability of the Company to Kunal. It was submitted that the petitioners were allotted 3900 shares as the petitioners could give a loan to a private limited company only if they were shareholders. It was contended that Kunal's name was not mentioned as a nominee in the alleged agreement dated 28.3.1994. It was averred that 3900 shares were allotted to the

petitioners as they had agreed to lend monies to the Company and not as nominees of Shri Ramesh T.Khanchandani. It was denied that Rs.3,54,51,000/- were paid by the Kunal as its contribution by way of loans and deposit to participate in the Worli project as a nominee of the Khanchandani group. It was reiterated that the said amount was lent and advanced as and by way of a loan which was repayable together with interest @ 18% per annum with quarterly rests. It was reiterated that the petitioner had refunded part of the loan and interest thereon @ 18% p.a. and that these payments were not by way of advance against any future profits as falsely alleged. That the notices to the Company went un-replied. That there was no agreement entered into by Kunal regarding distribution of profit or the adjustment as alleged or otherwise. It was denied that the amounts paid to Kunal were by way of interest against the ‘final profit of the project’ as alleged. It was denied that the petitioner as an alleged nominee or otherwise was liable to make any payment or repayment to the Company to return the alleged deposit of the alleged prospective flat owners or for any other reason. It was contended that it was absurd and unbelievable that any person would book a flat and pay a deposit to the developer for a project even without approval of the plans by the Municipal Corporation. It was contended that the

management of the Company, with a view to defraud the creditors like the petitioner and deprive them of their legitimate dues and to siphon off the amounts from the Company, created false and bogus liability in the books of accounts of the Company by showing bogus sales of the flats and this indicated the dis-honest intention of the Company. It was prayed that the Court should call upon the Company to produce all the relevant documents and records regarding the alleged sale. It was contended that the petitioner's claim was in respect of the repayment of the loan together with interest and was not in any manner what-so-ever dependent upon or linked to the Company making a profit or repaying the depositors and lenders of other groups as also Mr.Ramesh Khanchandani. It was denied that the petitioner's claim was unjust, complex and triable in nature. It was contended that Kunal was not concerned with the alleged financial difficulties of the Company and that the facts indicated that the Company was unable to pay its debts and should be wound up. It was denied that the amount paid by the Kunal to the Company was agreed contribution simpliciter. It was denied that the matter was lying with the Finance Minister and the respondent was put to the strict proof thereof. The other contentions made on behalf of the Company were also denied and it was stated that the Company had no defences whatsoever. It was urged that in the

circumstances, the petition may be admitted and appropriate orders may be passed.

(p) On the aforesaid averments, the Company Petition No.726 of 1998 was heard for admission on 12.2.1999 by Rebello,J. By a detailed order, dealing with the merits, this Court dealt with the agreement dated 28.3.1994 which was referred to in the affidavit in reply filed by the Company. It was observed that the petitioner was not a party to the said agreement. It was observed that the mere fact that the petitioner had participated and purchased equity can have no bearing on the loan advanced by the petitioner to the Company. That the reading of clauses-9 & 10 of the agreement could not support the contention sought to be advanced by the Company. On the contrary, a reading of clause-10 of the agreement made it clear that after sales were effected, Shri Khanchandani and Shri Makhija would share in the first Rs.2.00 crores and subsequently the other partners. That there was nothing in the clause which spoke about the nominees sharing in the profits of the first Rs.2.00 crores. Similarly, clause-9 did not refer to the amount of loan being paid only after the project was completed and profits received. That the oral contract sought to be pressed at the highest could be in respect of the parties to the agreement. That there was no pleading that the Company had entered into any

agreement with the petitioners. That at any rate two corporate bodies could not have entered into any oral agreement without the resolution of their respective Boards. There was an observation by the Court that Court found no merits in the defences raised by the Company. In the circumstances, an operative order was passed directing the Company to deposit sum of Rs.3,91,54,538/- within 8 weeks from the date of the order, failing which the petition would stand admitted. Against this order dated 12.2.1999, the company preferred Appeal No.401/99. In this appeal by an order dated 9.4.1999, time to deposit was extended by one week and ultimately on 20.4.1999 a division bench of this Court summarily dismissed the appeal. Admittedly, as the amount was not deposited by the Company, the petition stood admitted.

(q) After the admission of the petition the same was advertised and an affidavit dated 19.7.2005 proving publication came to be filed. That after the admission, on behalf of the respondent-Company a further affidavit dated 22.8.2005 affirmed by Mr.K.K.Motwani, a director of the respondent-Company came to be filed. In the said affidavit, the deponent affirmed and reiterated the averments in his earlier affidavit in reply dated 18.12.1998. The contentions relating to the petitioner being a nominee of the Ramesh Khanchandani group was

restated. The additional facts which were stated in this affidavit was that the understanding as to the contribution to be made by the 3 groups and the manner in which the interest accrued thereon was to be adjusted, was reflected in the Minutes of Meeting of the Board of Directors of the respondent-Company held on 24.1.1994 at which Mr.Shripal Dalal the partner of the petitioner firm was present. That it was agreed in the said meeting that the understanding reached between the parties would be reduced to writing and that the agreements in this behalf would be drawn up by the Advocate Mr.D.M.Harish. A copy of the minutes of the said meeting was annexed at Exhibit-A to this affidavit. That accordingly, the agreement had been drawn up by the said Advocate, which was accepted on 28.3.1994 as reflected in the Minutes of the Meeting of the Board of Directors of the respondent Company held on 28.3.1994. That representatives of each of the three groups were present at the said meeting and the copy of the minutes of meeting was annexed at Exhibit-B to the said affidavit. That, a part of contributions made by Khanchandani group and Makhija group were refunded, including towards interest due, out of the deposits received from the prospective flat purchasers who had booked flats in the building, proposed to be constructed on the said plot. In this behalf, the petitioners received an amount of Rs.1,75,90,698/-. However, in view of

various legal impediments, the development of the said plot could not proceed and demands began to be made by the flat purchasers for refund of the deposits made by them. In these circumstances, the Makhija group and Khanchandani group were required to bring back the amount refunded to them, to enable the respondent Company to pay off the flat purchasers who were seeking a refund. This request was not acceded to by the Khanchandani group, including the petitioners therein, while the Makhija group brought back an amount of Rs.2.5 Crores and agreed to pay interest at the rate of 18% p.a. on the amount retained by them. It was in these circumstances, that the Khanchandani group commenced legal proceedings against the Company in an effort to resist the request for bringing back the amount advanced and that the present Company Petition was a part of this attempt. That after admission of the Company Petition on 12.2.1999 discussions were held between the 3 groups to seek a way out of the impasse by selling or developing the plot of land at Worli which was the only substantial asset of the respondent Company. In or about November-2004, the petitioners indicated that they had a proposal from a party for the purchase of the said plot of land. In this behalf, Mr.Dalal addressed a letter dated 23.11.2004 to Mr.Ramesh Khanchandani, a copy of which was made available to the respondent Company, setting out the nature of the offer. The letter

indicated that the offer, from what was described as a "reliable party" was for Rs.18/- crores, which would leave approximately Rs.16 crores net in the hands of the respondent Company. The said letter indicated the total contributions made by each member of each group after taking into account the amounts that had been refunded to the Khanchandani and Makhija groups. The amount due to the petitioner was indicated as Rs.1.73 crores, on the basis of a net receipt of Rs.16 crores on the sale of the said plot of land, it was suggested that each party, including the persons who had booked flats in the said building, accept a pro rata distribution of the said amount of Rs.16 crores. The proposed pro rata distribution was indicated in a handwritten note that was annexed to the said letter. On the basis of this pro rata distribution, the petitioners were to receive an amount of Rs.1.2 crores. A copy of the said letter alongwith the annexures thereto was annexed at Exhibit-C to the affidavit. It was contended that the said letter fully confirmed the understanding that has been pleaded by the respondent Company that the three groups were to be entitled to interest on their respective contribution only in the event of a profit being made out of the development of the said plot of land and that they were to share in the profit or loss, as the case may be. It was further mentioned in the affidavit that the Company received an offer from

the petitioner's proposed buyer, one Narayan J.Pagrani, offering an amount of Rs.15.75 crores. This was followed by a letter dated 8.2.2005 which set out the terms of the payment to be made by the said Mr.Pagrani. Copies of the 2 letters dated 13.12.2004 and 8.2.2005 of Mr.Narayan J.Pagrani were annexed at Exhibit-D to the said affidavit. That, in view of the said discussions and the proposal to sell the said plot of land, and in the expectation of receiving the said amount of Rs.1.2 crores agreed to be accepted by them, the petitioners withdrew Company Application No.114 of 2002 filed by them in the present Company Petition. That however, most of the persons who had booked flats in the proposed building, were unwilling to accept out of sale proceeds less than the amount actually deposited by them. In the event that the flat purchasers were paid in full, there would be a further reduction in the amount that would be available to each of the groups who had made contribution by way of loans and deposits. The petitioners would have received amount of Rs.85 lakhs approximately which they were not willing to accept. That with a view to resolve the stalemate, Mr.K.K.Motwani suggested that the K.K.Motwani group would purchase the said plot of land at the same figure that was offered by Mr.Pagrani and would pay the petitioners the said amount of Rs.1.2 crores as desired by them. However, the petitioners declined to accept the said

proposal despite assurances that the entire amount of Rs.1.2 crores stated to be due to the petitioners would be paid forthwith by the K.K.Motwani group, as against the same amount of Rs.1.2 crores being paid by Mr.Pagrani in installments spread over a period of 12 months. Therefore, it was contended that the petitioners were using the winding up jurisdiction for pressurising the respondent Company into paying amounts to the petitioners which were in fact not legally due to them and that such an attempt ought not to be countenanced by this Court and it was submitted that Court should dismiss the Company Petition with compensatory costs.

(r) By a further affidavit dated 17.10.2005 affirmed by Mr.Shreepal S.Dalal on behalf of the petitioner, the balance-sheets of the Company from the year 1994-95 till the year 2003 to 2004 were placed on record in order to enable the Court to appreciate the financial position of the Company. By another affidavit dated 21.9.2005 affirmed by Mr.S.S.Dalal a reply was given to the affidavit of Mr.Motwani dated 22.8.2005. It was mentioned therein that after the order of this Court dated 12.2.1999 the Company had carried the matter in appeal bearing Appeal No.401 of 1999 but the said appeal had been dismissed on 28.4.1999 by the Division Bench of this Court. That thereafter the petitioner had taken out a Company

Application for appointment of a provisional liquidator. After the said Company Application had been taken out, Mr.Motwani had contacted the petitioner for settlement of the petitioners' claim against the said company and thereafter persuaded the petitioner to withdraw the said Company Application. However, the settlement could not take place. The petitioner was again approached for settlement after this petition came up on the board for hearing and final disposal. On this occasion also the settlement talks failed. It was denied that the deponent S.S.Dalal had attended the alleged meeting of the board of directors of the Company alleged to have been held on 24.1.1994 or at any other date. It was stated that he was not aware of the meeting of the board of directors held on 24.1.1994 and/or 28.3.1994 nor did he admit the contents of the Minutes of the aforesaid 2 meetings and put the said Company to the strict proof thereof. It was contended that after admission of the petition, the respondent Company had fabricated the Minutes with a view to fill in the lacuna in its case. It was contended that the contents of the alleged Minutes were contrary to and inconsistent with the contents of affidavit of the said Company in reply dated 18.12.1998. It was contended that false statements have been made on oath. That in November-2005, an offer for the sale of said plot of land was received in the sum of Rs.18 crores, out of

which Rs.2 crores was to be paid to BMC. That at that stage the said price appeared to be reasonable for the said plot of land and was acceptable to the petitioner provided the sale proceeds thereof were shared by all the creditors of the said Company on pari passu basis. Since the negotiations were going on and since this Court was not inclined to adjourn the Company Application No.114/2002 the petitioner was pursuaded by said Mr.K.K.Motwani to withdraw the said Company Application and the same was withdrawn on 28.1.2005 with liberty to take out a fresh application on the same cause of action. That after the said Company Application was withdrawn, Mr.K.K.Motwani, for the first time, stated that the flat purchasers were not prepared to accept any thing less than what they had paid. All the flat purchasers were related to Mr.K.K.Motwani or to Mr.Makhija or their friends and therefore, no settlement could be possible. That the offer contained in the said letters dated 13.12.2004 and 8.2.2005 was not responded to by the said Company and that the settlement was offered to the petitioner only with a view to avoid the consequences of the Company Application No.114/2002 being allowed. It was denied that Mr.Motwani ever suggested that the Motwani group would purchase the said plot of land at the same figure that was offered by Mr.Pagrani and would forthwith pay the petitioner the said amount of Rs.1.2 crores as

desired by the petitioner. That no offer of payment was ever made to the petitioner as alleged or otherwise and that the petitioner has learnt of the same for the first time from the said affidavit in reply. It was contended that since no such proposal was made to the petitioner, there was no question of accepting or declining the said proposal. That the sum of Rs.1.2 crores payable to the petitioner was arrived at on a pari passu basis in the year 2004 was acceptable by the petitioner at that time. However, the prices of immovable properties had undergone a sea change since January-2005 and were now much higher. It was contended that as the Company was unable to pay its debts and had not conducted any business since its inception, it was just and convenient that the Company be wound up and the Official Liquidator be appointed as liquidator of the Company for sale of plot of land which was the only substantial asset of the Company and distribution of the sale proceeds as per law. It was once again prayed that the Company Petition be allowed in terms of prayer clause-(a).

(s) By an affidavit dated 1.9.2006 affirmed by Mr.K.K.Motwani on behalf of the Company it was placed on record that sum of Rs.4.6 crores was refunded to the Khanchandani group including amount of Rs.1,80,79,631/- and a sum of Rs.4.65 crores was refunded to the Makhija group. That in view of

certain impediments in the development of the plot at Worli purchased by the respondent Company, some of the prospective purchasers of flats in the proposed building demanded a refund of their advances. Consequently, the Khanchandani and Makhija groups were called upon to bring back the moneys refunded to them. No amount was brought back by the Khanchandani group including the petitioner. The Makhija group brought back Rs.2.5 crores. M.T.Makhija was entitled to a sum of Rs.7,70,66,000/- from one Dyna Estates (P) Ltd., which also had dealings with the respondent Company. M.T.Makhija accordingly requested the said Dyna Estates (P) Ltd., to pay to the respondents a sum of Rs.2.5 crores on his behalf. This arrangement was recorded in letters dated 9.8.1998 (addressed by Dyna Estates Pvt.Ltd., to Mr.Makhija) and 15.12.1998 (addressed by Mr.Makhija to Dyna Estates Pvt.Ltd.,). Copies of these letters were annexed at Exhibits-A & B to this affidavit. Accordingly, a sum of Rs.2.5 crores was debited to the account of Dyna Estates (P) Ltd., maintained with the Company while an equal amount was credited to the accounts of the M.T.Makhija group viz. amounts of Rs.1,20,00,000/- and Rs.68,98,000/- to M.T.Makhija and Rs.61,02,000/- to one Montblanc Securities Pvt.Ltd., That in the year 2003-2004, Mr.M.T.Makhija paid Rs.61,02,000/- to respondent no.1 Company while Montblanc Securities Pvt.Ltd., was repaid a sum of

Rs.61,02,000/- by respondent no.1 Company. The said sum of Rs.61,02,000/- paid by Mr.M.T.Makhija was accordintly credited to his account. That in this view of the matter the position that Mr.Makhija had brought back part of the amount refunded to him was in fact accepted by the petitioner and borne out by their letter dated 23.11.2004. That the conduct of the Makhija group confirmed the nature of the arrangement between the parties namely that the project was a joint venture between the three groups, that each group was liable to account for any amount withdrawn by them and that they were obliged to bring back the funds so withdrawn in the event of the same being required by the respondent Company.

(t) By a further affidavit dated 7.3.2007 affirmed by Mr.K.K.Motwani on behalf of the Company, a statement indicating the funds brought in by the Makhija group, Khanchandani group and Motwani group (which statement had been tendered across the bar and was being relied upon by the senior Counsel who was arguing the matter) was placed on record and marked at Exhibit-A to the affidavit. Similarly a cash flow statement for the years 1994-95 to 2004-2005 including contributions by the Motwani group, Makhija group and Khanchandani group; advances for the sale of flats and project cost were also placed on record and marked at Exhibit-B to the

affidavit. Similarly receipts issued by the Corporation were also placed on record at Exhibit-C to the said affidavit. It was contended that the petitioner was bound and liable to restrict his case for winding up as made out in the petition and not travel beyond the petition. Petitioner could not raise arguments or pleas not alleged in the petition or his affidavits. It was stated that the exhibits annexed to this affidavit were tendered pursuant to the queries raised by the Court on the basis of arguments advanced on behalf of the petitioner not warranted by the pleadings.

(u) By an affidavit dated 16.3.2007 affirmed by Mr.S.S.Dalal a partner of the petitioner firm, a reply was given to the affidavit of Mr.Motwani dated 7.3.2007. It was contended that the audited balancesheet for the year ended 31.3.2004 showed that unsecured loans amounting to Rs.6,65,76,747/- were payable by the respondent Company to the petitioners and the other unsecured loans repayable by the respondent Company was to the tune of Rs.59,31,196/-, out of which also Rs.1,00,000/- was lent and advanced to a sister concern of Mr.K.K.Motwani. It was contended that this falsified the defence of the respondent Company and indicated that the said defence was not bonafide or believable. It was contended that the entries in the statements at Exhibits-A & B to the affidavit of

Mr.K.K.Motwani dated 7.3.2007 were reflected under the heads different from these shown in the audited balance sheets of the Company and were totally contrary to the audited balance sheets of the Company as well as to the averments in its earlier affidavits. It was contended that respondent has perjured on oath and not only guilty of contempt of Court but also no credence should be given to any of the affidavits filed before this Court. That both these statements Exhibit-A & B as well as the audited balance sheets were signed by Mr.K.K.Motwani and statements contrary to the statutory records have been made to mislead this Court. It was contended that though a loan of Rs.22,500,000/- from Montblanc Securities was reflected in the Company's balance sheet for the year ended 31.3.1994, the same was not reflected in the balance sheet for the year ended 31.3.1995. The sum of Rs.67,500,000/- was not reflected in the balance sheet for the year ended 31.3.1995 but a sum of Rs.81,804,000/- was reflected as a secured loan to the Company from Credit Lyonnais. It was submitted that the secured loan from the bank could not be called a contribution by Manohar T.Makhija as stated in Exhibit-A to the affidavit in reply. It was submitted that the sums of Rs.7,850,000/-, 7,500,000/- and 1,000,000/- aggregating to Rs.16,350,000/- were shown as contribution on behalf of Mr.K.K.Motwani in Exhibit-A to the affidavit in reply but the same was

shown as advance against the flats at Worli in the audited balance sheet of the Company for the year ended 31.3.1994 and that as per the balance sheet for the year ended 31.3.1995 the Motwani Enterprises had given a loan of only Rs.7,24,000/- to the Company and not of Rs.43,687,000/- as reflected in Exhibit-A to the said affidavit. It was therefore, submitted that the statements made in Exhibit-A to the said affidavit so far as they relate to the contribution by Mr.K.K.Motwani and Mr.Manohar T.Makhija were contrary to the statements made in the audited balance sheets of the Company for the years ended 31.3.1994 and 31.3.1995. It was contended that while the amounts reflected at Serial Nos.2, 4, 13 & 19 were shown as contribution on behalf of Mr.K.K.Motwani in Exhibit-B to the said affidavit in reply in the year ended 31.3.1994, the same were shown as advance against the sale of flats at Worli in the balance sheet for the year ended 31.3.1994. It was surprising that Mr.D.M.Harish, who was well known professional was shown as a part of K.K.Motwani group. That moreover a sum of Rs.81,840,000/- was shown as a secured loan to the Company and not as a contribution on behalf of Mr.Manohar T.Makhija as stated in Exhibit-B to the affidavit. That against the contribution of Rs.12,08,900/- by or on behalf of Mr.K.K.Motwani a sum of Rs.1,94,47,633/- was lent and advanced by the Company to the sister concerns of Mr.K.K.Motwani.

It was submitted that sum of Rs.52,50,000/- shown in Exhibit-B to the said affidavit was not the contribution of Mr.M.T.Makhija but was the secured loan taken by the Company from Mashreq Bank. All other amounts shown under M.T.Makhija group in Exhibit-B to the said affidavit were shown in the audited balance sheets of the Company as advance against the sale of flats. The grievance was made that the petitioners had not been furnished copies of the balance sheets for the years ended 31.3.2005 and 31.3.2006 and as such the Company was put to the strict proof of the contents thereof. Statements as per the audited balance sheets of the Company for the year ended 31.3.1994 and 31.3.2004 were annexed to this affidavit at Annexure-A & B and the extract prepared from the audited balance sheets of the Company for the year from 31.3.1994 to 31.3.2004 showing the position relating to the unsecured loans received by the Company, advances pending allotment of flats and the amounts lent and advanced to the sister concerns of Mr.K.K.Motwani was annexed at Exhibit-C to the affidavit. It was contended that in view of the aforesaid, the defence of the Company was neither bonafide nor substantial and therefore, the Company was liable to be wound up.

(u) By an affidavit dated 19.4.2007 filed by way of a rejoinder to the affidavit dated 16.3.2007 affirmed by Mr.K.K.Motwani on behalf of the Company

it was denied that the entries in the audited balance-sheet for the year ended 31.3.2004 falsified the defence of the Company or indicated that such defence was not bonafide or not liable to be believed. It was stated that the contribution made or arranged by the 3 groups were accounted for as unsecured loans, secured loans or advances pending allotment of flats. As such the entire contribution made by the 3 joint venture members were not reflected in the account of the Company as unsecured loans but were accounted for as unsecured loans, secured loans or advances pending allotment of plots. The purpose of Exhibits-A & B to the deponent's affidavit dated 7.3.2007 was to show how the initial contribution was brought in by the three groups and to disclose the cash flow position of the respondent Company including joint venture contributions for the period from 31.3.1994 till 31.3.2005. It was denied that Exhibits-A & B to the affidavit dated 7.3.2007 were contrary to the audited balance sheets of the respondent Company and the said exhibits infact, reflected figures which were to be found in the balance sheets of the Company. It was denied that the averments in the affidavit dated 7.3.2007 were inconsistent with the averments in his earlier affidavits and amounted to perjury or contempt or were contrary to statutory record. That the statements at Exhibit-B to the deponent's earlier affidavit dated 7.3.2007

indicated the net cash flow position including contributions made by the 3 groups which were accounted for either under the caption "unsecured loans" or "advances pending allotment of flats" or as in the case of the Makhija group as "secured loans" procured from Banks on the basis and against the security of their Foreign Currency Non Resident (FCNR) deposits. It was contended that the cash flow statements reflected the true position that there were on account of internal adjustments within each group, with the contributions of particular members of that group and of the group itself varying from time to time. That the said statements however, demonstrated that as on 31.3.2005 while the Makhija group and Khanchandani group were short of their requisite contributions of Rs.9 crores each, the Motwani group had maintained with the Company an amount well in excess of the requisite contribution of Rs.6 crores. That the averments in paragraphs-4 & 5 of the deponent’s affidavit dated 7.3.2007 merely reiterated the position that was trite namely contributions of various members of each group had changed from time to time and that some of the contributions were reflected as advances pending allotment of flats or as secured loans. That the averments made regarding the alleged discrepancy in the amounts brought in by Motwani Enterprises was misconceived. While Motwani Enterprises brought in an aggregate amount of Rs.4,36,87,000/- on

18-19/4/1994 as reflected in the statement at Exhibit-A as part of the initial contribution of the Motwani group, due to internal adjustments within the group, the said amount had reduced in the course of the financial year to Rs.7,24,000/-. What was material was that as on 31.3.2005 the aggregate contribution of the Motwani group was well in excess of Rs.6 crores while the contribution of Makhija and Khanchandani groups was less than the requisite contribution of Rs.9 crores each. The other contentions raised in the affidavit in reply were also denied and it was contended that the defence set up by the Company was not bonafide or not being substantiated and the Company was liable to be wound up.

3. This bring us to the facts and contentions raised in the Company Petition No.171 of 2000. It may be stated at the very out set that the petitioner in this Petition Shri Tarachand H.Khanchandani (hereinafter referred to as "Tarachand") had initially filed Company Application (Lodg.) No.103/99 in Company Petition No.726/98 seeking intervention and similar reliefs as claimed in the earlier petition. The company however, took a stand that the petitioner should file an independent petition and therefore, by order dated 20.12.1999 passed by S.S.Nijjar,J the application which was by way of judges' summons was disposed off

with liberty to Tarachand to file a separate Company Petition. It is in pursuance of this liberty, coupled with the substantial statutory rights that the Company Petition No.171/2000 was filed by Tarachand on 9.2.2000. The facts as stated in the various averments in this petition and the events relating thereto are as follows :-

(a) It was mentioned in the petition that on or about 15.4.1994, on a request made by the Company to provide temporary financial assistance to fulfill and discharge its liabilities to acquire and purchase an immovable property being a plot at Worli on auction sale by the appropriate authority under the Income Tax Act and for meeting the consideration price of Rs.21,75,00,000/- the petitioner provided advances to the Company in the sum of Rs.40899000/- by way of temporary financial assistance. The company had agreed to pay interest @ 18% p.a. on the amount so advanced and the amount so advanced was duly acknowledged by the Company. That on 1.4.1996 a sum of Rs.3,47,83,435/- was outstanding as due and payable by the Company to the petitioner. The Company had shown the said outstanding amount as due in their books of account as credit to the loan account of the petitioner Tarachand to the Company. Since the Company was in financial difficulties and unable to pay the said outstanding dues and interest at the aforesaid rates of 18% for the period

1.4.1995 to 31.3.1996, the Company agreed to pay interest by its letter dated 27.3.1996 and confirmed having credited the amount of Rs.56,35,006/- after deducting a sum of Rs.6,26,012/- as TDS @ 10% as interest for the period from 1.4.1995 to 31.3.1996 in the loan account of the petitioner Tarachand as shown in its books of account and further confirmed that the outstanding loan as on 31.3.1996 was Rs.4,04,18,441/-. The company also issued a TDS certificate dated 10.6.1996 confirming the aforesaid facts. A copy of the letter dated 27.3.1996 was annexed at Exhibit-B to the petition. That inspite of repeated requests and demands and though promises were made, the Company avoided, failed and neglected to repay the said outstanding amount nor did the Company paid interest at the aforesaid rate payable at the end of every year. That the Company had admitted, confirmed and acknowledged its libiality to pay the said amount to the petitioner in its accounts and balance sheets published for the years upto 20.6.1998. The statements which were annexed to the audited reports of the Company for the years 1996-97 and 1997-98 reflecting this position were annexed at Exhibits-C & D to the petition.

(b) That somewhere in August-September 1998 Tarachand learnt that M/s.Kunal & Co. being one of the creditors had filed a Company Petition being Company Petition No.726/1998 for winding up of the

Company and other reliefs as prayed for therein. Their Advocate therefore, called for this proceeding from the Advocates of the the said Kunal and were informed in due course by the Advocates for Kunal that the said petition had been admitted. They also learnt that by an order dated 23.9.1999 it had been recorded that the Company had agreed to deposit the claim amount of Kunal within 15 days from receipt of the amount from Income Tax Department and that the Company would not alienate, transfer or create third party interest in respect of the property at Worli. In the circumstances, an intervention application was made but the same was disposed off with liberty to file a separate petition. That thereafter the petitioner by his Advocate's letter dated 24.12.1999 addressed to the Company, recorded the relevant facts and demanded the payment of dues. The said letter was served upon the Company at its registered office on 27.12.1999 and the Company acknowledged the receipt of the said letter. The company however, neglected and failed to pay the amount due to the petitioner. A copy of the Advocate's letter dated 24.12.1999 was annexed at Exhibit-J to the petition.

(c) The petitioner Tarachand contended that he was one of the shareholders of the Company and as such he was entitled to receive notice of the annual general meetings as also copies of the annual

accounts of the Company every year. He however, did not receive any such notice or a copy of annual accounts for the period from 1.4.1998. Therefore, he was not aware of the present financial position of the Company save as what was stated earlier in the petition. That as recorded in the annual accounts and statements of liabilities for the period ended 31.3.1998, it was seen that the Company was heavily indebted to its creditors including unsecured creditors. That the company was not going to develop the said property and in the circumstances, the petitioner had lost confidence and was therefore seeking winding up of the Company on just and equitable ground also. That the acts of omission and commission on the part of the Company and particularly of its director Shri Motwani who has been in charge of the affairs of the Company were so gross that the said Company had defrauded the various creditors of the Company. To the best knowledge of Tarachand, the Company had so far not obtained sanction of plans, secured the issue of commencement certificate and other orders/approvals from the concerned authorities and therefore, there were no chances of commencing and completing the development of the property purchased in auction from the Income-tax department. That the Company had not shown readiness and willingness to take appropriate steps for the purpose of development of the said property. The company had not given any

proposal to this Court in the pending Company Petition No.726/1998 to discharge its liability to its creditors. The petitioner apprehended that if the said Company succeed in obtaining a refund of the amount of auction price from the Income-tax department, such amount will be siphoned away and none of the creditors will get a return of their amount and claim towards interest or the Company may refund the said amount to its selected creditors to the prejudicial interest of others. That the property was lying vacant and no construction activity had started. It was averred that therefore, it was absolutely a fit case where pending the hearing and final disposal of the petition, the official Liquidator be appointed as Liquidator with all powers under the Company Law. That no prejudice would be caused to the Company if Official Liquidator was appointed as Liquidator. There were further averments relating to grant of injunction against the Company dealing with, disposing off or alienating or transferring or creating any third party right of any nature whatsoever in respect of the Worli property. It was therefore, prayed that the Company be wound up and Official Liquidator be appointed as Liquidator of the Company.

(d) By his affidavit dated 28.6.2000 affirmed by Mr.K.K.Motwani on behalf of the Company, a reply was

given to the averments in the petition. It was contended that the petitioner had suppressed vital and germane material and has not approached the Court with clean hands. That he had claimed compound interest though there was no provision for claiming such interest. The petition raised various complicated and triable issues, inter alia regarding the nature of the transaction between the parties. That the Company had been incorporated on 17.2.1982 by the deponent, his brother and a close friend. That on 19.1.1994 the appropriate authority of the income-tax department had auctioned the property at Worli for which the Company made a successful bid of Rs.21,75,00,000/- and paid earnest money of Rs.10 lakhs. That since the market at that time was prospering and had great potential, two NRIs Mr.Manohar T.Makhija and the petitioner's son Ramesh, introduced through a broker Shri Sunil Mirpuri, expressed interest in the Company's proposed development of the Worli property. That on 28.3.1994 an agreement was entered into between the deponent, Makhija and Ramesh and the said provided for the joint participation of Makhija, Khanchandani and the deponent. And all three were given positions in the board of directors. To this end, the deponent was required to take additional equity and Makhija and Khanchandani were required to subscribe to equity in the Company either by themselves or through their nominees, so that the

shareholding pattern of the Company would be 34% in favour of the deponent and 33% each in favour of Makhija and Khanchandani. Clause 4 of the agreement required the parties to contribute or arrange for such loans and funds as might be required for completing the purchase of the Worli property, payment of incidental expenses and taxes, and for financing the cost of construction. Clause-9 of the agreement provided that the deponent was to bring a sum of Rs.6 crores as his contribution; and that Makhija and Khanchandani, by themselves or through their respective nominees, were to bring Rs.9 crores each as their contributions. These amounts were to be brought in as loans or deposits and carried interest @ 18% p.a. A copy of this agreement dated 28.3.1994 was annexed at Exhibit-A to the affidavit. That prior to the execution of the agreement, a board meeting was held on 24.1.1994 wherein Ramesh Khanchandani was also present. It was mutually agreed that payment of such interest was nothing but an advance against their final profits and would be adjusted against their shares in the final profits which would be determined on the completion of the project. A copy of the minutes of the board meeting was annexed at Exhibit-B to the said affidavit-in-reply. That Khanchandani being a non resident Indian, his contribution was funded by his nominees to the extent of Rs.3,54,51,000/- by M/s.Kunal & Co., and the balance of Rs.5,45,49,000/-

by his various nominees which included Tarachand and concerns controlled/owned by Tarachand or wherein Tarachand had interest. The contribution by Tarachand and the other concerns where he had an interest were as follows :-

(i) Tarachand	Rs.4,08,99,000/-
(ii) Hotchand & Sons	Rs. 40,50,000/-
(iii)Teekay Silk Mills	Rs. 41,00,000/-
(iv) H.Tarachand	Rs. 55,00,000/-

The petitioner as the nominee of Khanchandani, was also allotted 1000 equity shares out of the equity holding of 33% to be allotted to Khanchandani. That clause-10 of the said agreement dated 28.3.1994 inter alia provided that out of the sales receipts, the first Rs.2 crores would be taken equally by Khanchandani and Makhija and any surplus thereafter would be taken equally by all the three groups. That when the respective contributions from the three groups were received by the Company, the same were treated and minuted as having been received by and/or on behalf of the respective groups, regardless of the person actually making payment. Contribution of Rs.4,08,99,000/- of the petitioner was treated as having been received on behalf of Khanchandani group and so duly reflected in the minutes of the meeting of the board of directors of the company held on 17.6.1994. Thereafter at the

board meeting held on 27.3.1995, it was proposed that Makhija and Khanchandani be appointed as additional directors. The company thereafter prepared plans and submitted them to the BMC and in anticipation of sanction thereof, the Company received part payment/earnest money for the purpose of premises to be constructed on the Worli property after sanction was obtained. In terms of clause-10 of the aforesaid agreement, out of the first Rs.2 crores received, the Company made equal distributions to Makhija and his nominees and to Khanchandani and his nominees including Tarachand. The amounts paid periodically to Khanchandani and his nominees were in the proportions and manner specified in clause 10 of the agreement. That however, the project could not take off because of various objections raised from time to time by local Government Authorities. Initially, an objection against sanctioning of the plans was raised due to Coastal Zone Regulations. It took nearly two years to resolve this problem it was resolved only after the Chief Commissioner (Investment & NRIs), New Delhi, intervened at the complaint of the Indian Chamber of Commerce, Hongkong. Thereafter dispute was raised by the BMC about the title to the land. The BMC contended that the said plot of land at Worli was given on lease by them to RMDC Press (P) Ltd., and that the same belonged to them and that the appropriate authority of the income-tax

department was required to pay to BMC premium at 7% of the purchase price of Rs.21.75 crores which as per their calculations would amount to Rs.1.52 crores. That the appropriate authority of the income-tax department as per the letter dated 2.9.1997 addressed to the Joint Municipal Commissioner, MCGM contested this claim. Since the said plot was purchased by the Company from the Central Government in public auction, the Company had always felt assured about clear marketable title of the said land. The terms of auction sale did not contain any condition about the premium payable to MCGM and therefore, the Company was not liable to be fastened with any such unknown and undeclared liabilities. However, due to the said dispute between the BMC and the income-tax department the approval of the plans were not finalised. This adversely affected the entire project and, in particular sanction for the plans was held up. That sale agreements were therefore, not possible and hence, the second part of clause-10 of the agreement did not come into play and no question arose of further distribution. In fact the third party purchasers who had already made payments began demanding their money back. That as a result of undue delay in having the land conveyed to it and consequent delays in granting approval of the plans, the Company took up the matter with the Finance Minister for recession of the contract of purchase

of the plot by the company in public auction held by the appropriate authority and claimed refund of the purchase price together with interest and damages for losses suffered by the Company. That it was mutually agreed amongst all the participants that the payments of such interest to the participants was nothing but an advance against their final profits and would be adjusted against their shares in the final profits to be distributed equally in the ratio of 34:33:33 on completion of the said Worli project. That neither the Shri K.K.Motwani group nor Shri Manohar T.Makhija group took any interest at any time on the advances made by them to the company and therefore subsequently, such periodical payments of interest earlier made to Shri Ramesh T.Khanchandani and his nominees, including the petitioner therein, were also stopped. The company was awaiting the disposal of its complaint made to the Finance Minister. In view of this positive case the various contentions in the petition were denied. It was stated that the Company had out of the advances against a flat, refunded an aggregate sum of Rs.74,99,000/- and had also paid interest aggregating Rs.48,77,198/- to the petitioner, which monies required to be brought back in to the company to discharge the liability of the Company to the flat purchasers. It was contended that the claim made by the petitioner as contained in the particulars of claim was exaggerated, unjust

and not due to the petitioner. It was submitted that the books of account and letter addressed by the Company ought to be read in the light of the agreement dated 28.3.1994 between the parties and the decision of the board of directors of the Company mentioned in the reply. It was denied that the Company was heavily indebted to its creditors. It was contended that it was not a fit case for winding up or for appointing Official Liquidator and it was prayed that the petition be dismissed with costs.

(e) By a rejoinder dated 14.7.2000 affirmed by Tarachand H.Khanchandani it was contended that the nature of the transaction of loan was in terms accepted/recorded/shown and admitted by the Company in its statutory records. That by making false allegations the Company, the deponent and Motwani group were trying to create false dispute and raise false and untenable issues. It was denied that there was any agreement for adjustment of interest accrued on the amount so received by the Company against their alleged future profits. It was contended that a similar dispute has been raised in the petition filed by Kunal and in the order of this Court dated 12.2.1999 the defence had not been believed and an appeal against the said order passed by the single Judge of this Court has also been dismissed. It was contended that Tarachand was not

a party to the said purported agreement nor was there any written contract with regard to the contentions falsely raised by the Company. On the contrary, the documents including statutory records of the Company in terms confirmed their loan liability payable to the petitioner Tarachand unconditionally. It was contended that the petitioner Tarachand had nothing to do with the various clauses mentioned in the said agreement and since he was not a party to the said agreement, there was no question of treating the finance provided by him as the contribution by Mr.Ramesh Khanchandani. That the amount so provided had been treated/shown/recorded as loan and not as contribution as alleged. That the petitioner Tarachand was not a director of the Company and not concerned with any resolution allegedly passed by the Company on 24.1.1994 and it was denied that the interest paid to him was an advance against any profit as alleged. The deponent had deliberately and intentionally made false statements knowing them to be false and inconsistence. The Company itself had issued TDS certificate to the petitioner Tarachand. That the company was also provided with temporary finance from time to time by M/s.Teekay Silk Mills and H.Tarachand as requested and required by the Company. That the said Company M/s.Teekay Silk Mills was the sole proprietorship as concern of the petitioner wife. That the company had been paid

interest after deducting TDS in respect of the temporary finance so provided. The company by its 2 letters dated 3.8.1994, addressed to the said two concerns, paid the amount of interest by cheque. The company had also returned the amount of loan so provided. That since the petitioner Tarachand was not a party to the said agreement the Company could not link his just claim with any of the clauses of the said agreements. That the company had not taken any steps of proceeding against Income tax authority or BMC to address their grievance relating to the development of the said property. That the company had never agreed that payment of interest shall be treated as advance against any profits as alleged. That merely because Ramesh Khanchandani was a son of the petitioner, the petitioner should not be treated as his nominee. That the company itself had admitted and confirmed that the amount so provided by him was by way of a loan and apart from being a shareholder the petitioner had not participated in the affairs of the company. That in the company's letter dated 27.3.1996 it was confirmed that the amount mentioned therein was the loan amount and the letter mentioned the interest @ 18% p.a. and also indicated 10% TDS has been deducted from the amount of interest. Since the company pleaded financial difficulties to pay the amount of interest, the company had credited the amount to the petitioner's loan account and confirmed as outstanding, the loan

amount of Rs.4,04,18,441/-. That in the statement annexed to the balance-sheet for the year ended 31.3.1996, 31.3.1997 and 31.3.1998 the company had recorded the amount due to the petitioner as a loan. That the company had shown a huge amount of Rs.19 crores by way of consideration received from allotment of flats. That on one hand, Motwani had alleged that the company has not got the sanction of plans or issue of I.O.D. for the purpose of development of property purchased in auction from the income tax department, while on the other hand, the company has purported to allot flats and recovered huge amounts in crores. The company had not given any particulars or explanation as to why the said purported allotments had been made when there was no sanction of plans for development of the property. That if the company was directed to produce their relevant records with regard to the said purported allotments and the loans and advances allegedly made by the company , it would prove that the deponent Motwani had fabricated and manipulated the records of the company and siphoned away huge amounts either in his own name and in the names of his relatives and associate concerns. That the company had not taken any steps for development of the said property. The deponent has shown huge expenses allegedly incurred by him in the name of the company. The deponent thereby siphoned away and/or misappropriated the funds of the company to

his personal advantage and/or use. The company had not called its Annual General Meeting after March-1998 nor prepared and/or circulated its balance sheet and profit and loss account to its share holders and therefore, he was not in a position to comment further with regards to the affairs of the company after March-1998. He denied that he was a nominee of Shri Ramesh Khanchandani and that the amount advanced by him was towards contribution of Mr.Ramesh Khanchandani. He denied that there was any agreement to pay him any amount by way of profit for advancement of the said amount as alleged. He stated that he has nothing to do with the completion of the project. He stated that the purported allottes of flats were none else but the deponent himself, another director and/or their friends, relatives and associate concerns and such amounts have been taken away by showing loan and advances from the Company. Unless and until necessary plans were sanctioned and other permissions were obtained for development of the property, the company could not have entered into such transactions for allotment of premises. That if the company was having sufficient funds to discharge the liabilities of its creditors, they ought to have discharged the same. That instead of doing so the deponent had misappropriated the amount to his own concerns. That the attitude of the company was quite clear. It was not interested in

taking any steps for the purpose of development of the said property but interested only in refund/return of the amounts from the Central Government. There was no provision under the Income-tax Act for return/refund of such amounts and cancellation of the transaction. That though more than 6 years had passed, the company had not taken any steps, save and except that the Company had exchanged certain correspondences or made representation to the concerned Ministry for recission on the contract and return of the amount which was as such not permissible under the said Act. It was therefore, submitted that the petition be admitted and the necessary interim order pertaining to the appointment of Official Liquidator be passed.

(f) On 3.8.2000 on behalf of the company Mr.K.K.Motwani affirmed an additional affidavit denying that he has siphoned off a huge amount. He admitted that the Company had advanced loans to its sister concerns but claimed that these were advances in the course of ordinary course of business. These loans were clearly reflected in the accounts of the company and many of these loans had been repaid. That against loans amounting to Rs.4,05,35,278/- advanced by the company as on 31.3.1999, the company itself received loans and advances from its sister concerns amounting to Rs.4,08,10,171/- as on

31.3.1999 as per the statement annexed to Exhibit-A to this affidavit. That this statement indicated that the amounts received from the sister concerns were in excess of the loans and advances made by the company. It was contended that as on 31.3.1999 the total amount lying with the company as advance towards allotment of flats was Rs.20,30,54,908/- and the particulars of advances received against allotment of flats as on 31.3.1999 were as per the statement annexed to Exhibit-B to the affidavit. It was however, contended that though a sum of Rs.6,35,30,972/- was shown as advance towards allotment of a flat paid by one Mr.Lal M.Daryanani, in fact out of this amount only a sum of Rs.1,24,00,000/- was the advance received towards allotment of a flat. The balance amount of Rs.5,11,30,972/- was brought into the company as deponent Motwani's contribution towards the project. Similarly, amount of Rs.1,25,00,000/- showed as the advance paid by Mr.K.K.Motwani towards the allotment of a flat was actually deponent's contribution towards the project under the agreement dated 28.3.1994. That the last four entries in the statement relating to Mr.Manohar T.Makhija, Mimrata Prakash Wadhva, Mr.Sanjay Makhija and Montblanc Securities Pvt.Ltd., all pertained to the contribution of the said Mr.Manohar T.Makhija under the agreement dated 28.3.1994. That the rest of the entries represents payments made as advances towards

allotment of flats. On this footing, it was denied that the deponent had siphoned off or misappropriated the funds of the company and it was urged that the Company Petition was liable to be dismissed with costs.

(g) After hearing all the parties and perusing the material on record, by an order dated 4.8.2000 the petition was admitted by K.K.Baam,J and the advertisement was dispensed with as the earlier petition filed by Kunal has been advertised.

(h) When the petition reached the stage of final hearing, an affidavit dated 16.11.2006 was filed by Mr.K.K.Motwani on behalf of the Company placing on record the various steps which were taken by the Company in respect of the Worli property. It was stated therein that on 19.01.1994 the Company made a successful bid for the Worli property and the structures standing thereon at an auction sale conducted by the appropriate authority of the Central Government. On the said date, the Company paid Rs.10 lacs as earnest money towards total bid of Rs.21,75,00,000/-. Out of the contributions brought in by way of loans and deposits by the three groups who were to develop the said property in a joint venture - the Motwani group, the Makhija group and the Khanchandani group, the Company paid the remaining purchase consideration of the said

property for which receipts were issued by the appropriate authority. The said receipts were annexed at Exhibit-A to the affidavit. The appropriate authority of the Income-tax department handed over peaceful and vacant possession of the said property to the Company on 25.4.1994 and issued a letter of possession on the same date. A copy of the said letter of possession was annexed at Exhibit-B to the said affidavit. Thereafter, the Company appointed one M/s.Pushkar Consultants as their Architects to prepare plans for re-development of the said property and to submit the same for approval to the BMC. That, by a letter dated 6.7.1994 addressed to the Executive Engineer, BMC, the said Architect sought the issuance of a NOC permitting residential development on the said property which was situated in the general Industrial Zone. A copy of the said letter was annexed at Exhibit-C to the affidavit. By his reply dated 8.10.1994, the Executive Engineer acceded to the said request on the terms and conditions set out in the said letter. A copy of this reply was annexed at Exhibit-D to the affidavit. That in the meanwhile, by a letter dated 10.9.1994 addressed to the Additional Collector and Competent Authority (ULC), the said Architect forwarded documents mentioned therein and requested for issue of necessary NOC under the provisions of the Urban Land Ceiling Act to the proposed redevelopment of the

said property. A copy of this letter was annexed and marked at Exhibit-E to the affidavit. By an Order dated 6.1.1995 passed under Section 8(4) of the Urban Land Ceiling Act, the Deputy Collector and Competent Authority (III) ULC, Greater Bombay, found that there was no surplus vacant land with the Company. A copy of the said order was annexed at Exhibit-F to the affidavit. In the meanwhile, by their Architect's letter dated 16.12.1994 addressed to the Executive Engineer (B.P.) of the BMC, he forwarded the requisite documents and scrutiny fee in support of their application for building permission including inter alia, a plan of proposed development and by their letter dated 2.8.1995 addressed to the said Architects, the BMC stated that the plans submitted by the Company could not be considered in so far as the proposed development was within 500 meters of the high tide zone and hence affected by the Coastal Regulation Zone Notification, 1991. The said letter noted that a No Objection Certificate from the Ministry of Environment and Forests (MOEF) was required to be submitted by the Company for the proposal to be processed on the merits. A copy of this letter was annexed and marked as Exhibit-H to the affidavit. That on receipt of this letter the Company applied for the requisite environmental clearance to the MOEF. The Company followed up the matter with the MOEF for which purpose one Mr.S.Hemrajani, Chief

Engineer and deponent went 4 or 5 times to Delhi and eventually, by their letter dated 17.5.1996 the MOEF granted environmental clearance for construction of a residential building as proposed by the Company on the said property on the terms and conditions set out in the said letter. A copy of the said letter was annexed at Exhibit-I to the affidavit. That the Company's Architect then submitted the letter of the MOEF to the BMC and after due scrutiny the BMC approved the plans and issued an IOD dated 21.2.1997 inter alia setting out the conditions to be complied with before commencement of the development work. A copy of the said IOD alongwith the notes appended thereto was annexed and marked as Exhibit-J to the affidavit. That the said Architect also obtained a NOC dated 5.3.1997 from the Chief Fire Officer and held the joint survey with Assistant Engineer (Survey), BMC and on the basis of the survey obtained a demarcation of the open setback land affected by the sanctioned/regular line along B.G.Kher Marg on which the said property abuts. That by letter dated 21.3.1997 addressed to the said Architect, the Executive Engineer (Survey) recorded the results of the said joint survey. That on the basis of IOD, by a letter dated 23.4.1997 addressed to the Ward Officer, Estates, BMC, the Architects also sought issuance of his NOC as a prelude to a commencement certificate being issued. A copy of the said letter was annexed at Exhibit-M to the

affidavit. This letter was sent on account of the fact that BMC was the owner and lessor of the said property in respect of which the Company had acquired the lease hold rights. The Company did not receive an immediate response to their request for an NOC. However, by a letter dated 15.7.1997 addressed to the appropriate authority of the income-tax department, the BMC demanded payment of a sum equivalent to 7% of Rs.31 crores as a purported transfer fee in respect of the said property. This demand was on the purported basis that the BMC was the lessor of the said property, the original lessee being one Ratanshaw Merwanji Dadabhoy Chamanbaugwalla. BMC claimed that they were entitled to payment of 7% of the consideration as a "transfer fee" on the lessee transferring his interest under the Lease Deed to any third party. The said letter purported to claim that the original lessee had without authority purported to transfer their interest in the said Lease Deed to Tata Housing Development Co. Ltd., without payment of the requisite transfer fee and without notice to the BMC. It was on approval being sought under Section 269 of the Income-tax Act to this proposed transaction that the Income tax department had acquired the said property and put it up for sale in a public auction at which the Company had purchased rights to it. The BMC claimed by the said letter that they were entitled to payment of a transfer fee

on the abortive sale of the leasehold rights by the original lessee to Tata Housing and the subsequent transfer by the Income-tax Department to the Company. A copy of the said letter was annexed at Exhibit-N to the said affidavit. That by their reply dated 2.9.1997, the appropriate authority contended that no amount was in fact, payable as transfer fee to the BMC in so far as the proposed transfer by the original lessee in favour of Tata Housing had not been completed and that the subsequent sale by auction under Section 269 UC (1) of the Income Tax Act would not attract any incident of transfer fee as sought to be claimed by the BMC. Without prejudice to the aforesaid, the Income-tax department also claimed that, as per the terms and conditions of the auction sale, it was the transferee i.e. the Company that would be liable to pay all charges incidental to the transfer of the said property to their name. A copy of the said letter was annexed at Exhibit-O to the said affidavit. That the BMC declined to accept the stand of the appropriate authority that no transfer fee was payable on the sale by the Income-tax department to the Company and refused to further process the plans submitted by the said Architects on behalf of the Company. By a letter dated 5.11.1997 purported to be in reply to the said Architect’s earlier letter dated 23.4.1997 the Ward Officer (Estates) of the BMC called upon the Company

to pay an aggregate sum of Rs.2,07,84,386/- inclusive of a fee of Rs.1,52,25,000/- for transfer of the said property in the name of the Company. By their letter dated 23.1.1998 the Architects informed the BMC that no transfer fee was payable on a compulsory acquisition and subsequent auction sale of a property by the Income-tax department and that in any event any such alleged transfer fee would be payable by the department and not by the Company. A copy of the said letter was annexed at Exhibit-Q to the said affidavit. The BMC refused to relent in the matter of payment of the transfer fee or to process any further application submitted by the said Company for development of the said property.

(i) It was then contended in the said affidavit that in the aforesaid circumstances, the Company sought a refund of the purchase consideration paid by them to the Income-tax department. In this behalf, the Company also addressed a letter dated 10.6.1998 to the Finance Minister, Government of India setting out the circumstances surrounding the purchase of the said property by the Company including inter alia, the failure on the part of the appropriate authority to disclose, as a prelude to the auction, any potential financial liability on the part of the transferee to pay any amount by way of a "transfer fee" to the BMC to perfect their title. The Company accordingly, sought a refund of the amount paid by

them to the appropriate authority towards purchase of the said property alongwith interest. A copy of the said letter dated 10.6.1998 was annexed at Exhibit-R to the affidavit. The company did not receive any reply to the said letter nor did the Union of India or the appropriate authority accede to their request for refund.

(j) It was then contended that Mr.Ramesh Khanchandani who was the son of the petitioner was a person of whom the petitioner was a nominee and the said Ramesh Khanchandani was in constant touch with Mr.K.K.Motwani. That the decision to seek a refund as aforesaid was also made jointly by the three groups (including the Khanchandani group) in consultation with each other.

(k) However, on 3.9.1998, Company petition No.726 of 1998 was filed in this Court by M/s.Kunal & Co. who was also a nominee of Mr.Ramesh Khanchandani seeking to wind up the Company. The said Company Petition was admitted by an order dated 12.2.1999 by this Court and thereafter, the proposed dvelopment of the said property came to a standstill as it was not possible to develop the property under an impending threat of liquidation. That the present Company Petition was also filed on 9.2.2000 and rendered any proposed development of the said property impossible and as such the Company could not and did not take

any further steps for development of the said property. That recently, the said property came to be attached by the BMC for recovery of purported tax arrears amounting to Rs.44,08,548/- and was proposed for auction sale to recover the tax arrears. To avoid the said property being put to sale and to prevent the interest of the Company being irreparably prejudiced, the deponent arranged through his firm for the said payment to be made to the BMC and the attachment to be lifted. During the pendency of the 2 Company Petitions, the Company through Architect paid the requisite charges to the BMC for renewal from time to time of the building proposal in respect of the said property. It was submitted that in the aforesaid facts the Company had made diligent attempts to develop the same and thereafter, to seek a refund of the amount paid to the appropriate authority alongwith interest in view of the extortionate transfer fee wrongly and unjustly demanded by the BMC. It was submitted that the process of development of the said property could not be successfully carried out in view of the aforesaid Company petitions and that having regard to the steep rise in prices of immovable property, the property is a valuable asset capable of development and that Company could carry out business at the profit.

(l) That by a further affidavit dated 7.3.2007

affirmed by Mr.K.K.Motwani on behalf of the Company the statement of funds initially brought in by the 3 groups was placed on record at Exhibit-A to the said affidavit. Similarly, the cash flow statement of the years 1994-95 to 2004-2005 including contribution by the Motwani group, Makhija group and Khanchandani group, the advances for the sale of flats and project cost were also placed on record and marked at Exhibit-B to the said affidavit. Lastly, the receipts issued by the BMC for payment of property taxes by the Motwani group were also placed on record and marked at Exhibit-C. It was contended that the petitioner was bound and liable to restrict his case for winding up as made out in the petition and not travel beyond the petition. Moreover, the petitioner in any view of the matter could not raise arguments or pleas not alleged in the petition or his affidavit. The said exhibits annexed to his affidavit were tendered pursuant to the queries raised by the Court on the basis of arguments advanced on behalf of the petitioner not warranted by the pleadings.

(m) It may be stated that in addition to the various affidavits mentioned here-in-above, the Advocate for the petitioner also filed a compilation dated 13.11.2006 enclosing the balance-sheets for the years 1994, 1995, 1996, 1997, 1998 and 2004. The original Minute books of the Company were also

tendered and kept on record. This is how the record in the 2 petitions rested.

4. I would like to first make a brief reference to the legal submissions made by both the parties. On behalf of both the petitioners, their Counsel contended that a winding up petition was a proper remedy for enforcing payment of a just debt and was a mode of execution. In support of this submission, reliance was placed on observations made by the Division Bench of this Court to this effect in paragraph-25 of their judgment in the case of **IN RE : Nilesh Lalit Parekh** reported in 2002(1) Mh.L.J. It was contended that this was a case where there was a complete failure of the object of the Company in developing the plot at Worli and that the complete failure of the Company's object was a ground for winding up. In support of this proposition, reliance was placed on the judgment of a single Judge of the Madras High Court in the case of **S.Sundaresan V/s. Plast-O-Fibre Industries Pvt.Ltd.,** reported in 1993 (76) Company Cases 38, wherein the Court ordered winding up as it found that the substratum of the company had dis-appeared because the object for which the company was incorporated had completely failed and the respondent-company had not been able to manufacture and sell such products on a commercial basis. It was then contended that principle of just and

equitable could not be given a precise definition and that ultimately to decide whether the company should be wound up because it was just and equitable to do so must depend upon the facts and circumstances of each case. The considerations were necessarily equitable considerations and made in the facts of a given case as super-imposed by law. Whether it could be done so in a particular case was a matter that could not be put in a straight jacket. That the sixth clause of section 433 viz. just and equitable was not to be read as being ejusdem generis with the preceding five clauses. While the 5 earlier clauses prescribed definite conditions to be fulfilled, for the one or the other to be attracted in a given case,the just and equitable clause left the entire matter to the wide and wise judicial discretion of the Court. The only limitations were the force and content of the words themselves "just and equitable". Reliance was placed on the observations of the Apex Court in paragraph 33 to 37 of the judgment in the case of **Hind Overseas Pvt.Ltd., V/s. R.C.Zunzunwalla** reported in AIR 1976 SC 565. It was then contended that in deciding what is just and equitable, the facts as obtaining on the date of the hearing of the winding up petition must be taken into account and the Court was not precluded from looking into circumstances developing later by way of evidence in support of the allegations made in the petition.

Reliance was placed upon the observations to this effect in the case of **In re FILDES BROS. LTD.,** reported in (1970) 1 S.L.R. 592 as also the observations of a single Judge of the Madhya Pradesh High Court in the case of **Virendra Singh Bhandari & Ors V/s. Nandlal Bhandari & Sons** Ltd., reported in 1982 (52) Company Cases 36.

6. The legal submissions made on behalf of the respondent-company were as follows :-

. It was contended that a winding up petition was a legal remedy which should be resorted to as a matter of last resort, only in very compelling circumstances and when other means of healing a company were absolutely of no avail. In this regard reliance was placed upon the judgment of a single Judge as well as the Division Bench Judgment of the Panji bench of this Court in the case of **Daulat Makanmal Luthria V/s. Solitaire Hotels Pvt.Ltd., and Ors.** reported in 1993 (76) Company cases Bombay-215. It was contended that the winding up petition was not a legitimate means of settling a bonafide dispute with a company. A petition presented ostensibly for winding up but meant to exercise power will be liable to be dismissed. The procedure under Section 433 of the Act was summary and disputed questions of fact could not be decided. Reliance was placed upon the observations to this

effect in a judgment delivered by the Division Bench of the Karnataka High Court in the case of **M.R.Sriniwas V/s. Golden Green Farms & Resorts Pvt.Ltd.,** reported in 2002 (112) Company cases 28 and a judgment of the Supreme Court in the case of **Amalgamated Commercial Traders (P) Ltd., V/s. A.C.K.Krishnaswami & ors.** reported **in** 1965 (35) Company Cases 456. It was submitted that where there was a genuine/substantial dispute as to the liability of the respondent-company to pay the claim, based on substantial grounds, the proper forum for its settlement was the Civil Court. To butress this proposition, reliance was placed upon several judgments such as the judgment of a single Judge of the Karnataka High Court in the case of **Kamdhenu Enterprises V/s.Vivek Textile Mills** reported in 1984 (55) Company cases 68. In support of this proposition, reliance was also placed on the judgment of the Apex Court in the case of **Mediquip Systems (P) Ltd., V/s. Proxima Medical System GMBH** reported in (2005) 7 SCC 42. Reference was further made to the judgment of the single Judge of the Karnataka High Court in the case of **Divya Export Enterprises** reported in 1991 (70) Company Cases 692. It was then contended that fresh pleading could not be permitted to be raised by way of an affidavit if the petition as filed did not contain specific pleading. Reliance was placed upon the judgment of the single Judge of this Court in the case of **Mahesh**

Enterprises V/s.Argus Industries reported in 1999(3) Mh.L.J. 93. It was submitted that the petitioner had approached this Court by suppression of facts and when there was a suppression of facts and with-holding of a vital document, this should necessarily entail the dismissal of the petition. In support of this submission, reliance was placed upon a judgment of the single Judge of this Court in the case of **Agarwal Industries Ltd., V/s. Golden Oil Industries** reported in 1999 (3) BCR 39. Yet another judgment cited in support of this proposition was a judgment of the Apex Court in the case of **S.P.Chengalvaraya Naidu V/s.Jagannath** reported in AIR 199**4** SC 853 and the judgment of a single Judge of the Delhi High Court in the case of **Jyoti Limited V/s. International Pumps & projects** reported in 2001 Company Cases 104 wherein it was held that only when there was no practical possibility of remedying the mis-management that it became a proper case for winding up a company on the just and equitable grounds. Reliance was placed upon the judgment of the single Judge of the Delhi High Court in the case of **Sureshkumar V/s.U.P. Mineral Products Ltd.,** reported in 1996 (Vol.87) Company Cases 223 wherein the Court concluded that the reduction of share capital without approval of shareholders and sanction of the Court or the fact that the petitioner had been removed from the board of directors could not be a ground for winding up

under the just and equitable clause.

7. I may state that there were other judgments which were cited. The zerox copies of the same have been tendered. I have perused the above referred other judgments. Certain other judgments of the High Court which were cited merely re-state the position as stated in the judgments which I have mentioned here-in-above and reiterate the settled position of law in relation to the winding up of a company. Ultimately, the question as to whether the Court should wind up a Company must turn on the peculiar facts of each case. The facts in no two cases are identical and accepting the aforesaid propositions of law, as reflecting a long settled position of law, on the facts of the present case, I am of the view that both the petitions need to be allowed for the reasons which I enumerate here-in-below :-

8. Both the petitions are filed on 2 grounds. The first is as contemplated under Section 433(e) r/w section 434 (1) (a) and section 433(f) of the Companies Act. It is the contention of the petitioners that the company is unable to pay its debts as though the company was indebted to the petitioners in a sum exceeding Rs.500/- and though a notice contemplated under Section 434(1) (a) had been delivered at the registered office of the

company, requiring the company to pay the sum so due, the company had for 3 weeks thereafter neglected to pay the sum or to the petitioners and therefore, were deemed to be unable to pay its debts. The averments made by the petitioner in Company Petition No.726/98 indicated that the petitioner had lent and advanced to the company an amount of Rs.3,54,51,000/- during the period February to March-1994. The company had duly received the said amount and agreed to repay the same alongwith 18% interest. That in fact, the company had repaid an amount of Rs.39,40,000/- on 7.6.1994 and had issued another cheque for Rs.9,31,707/- towards interest due upto 31.5.1994. That further repayment of the loan was made by a cheque dated 8.7.1994 for an amount of Rs.8,35,000/-, a cheque dated 4.8.94 for Rs.39,71,000/- and a cheque dated 8.2.95 for Rs.20,000/-. That interest was also paid to the petitioner on the amount of loan upto 31.12.1994. That after 31.12.1994 the company failed to pay the balance amount of the loan or interest due thereon to the petitioner. Thus, the amount due to the petitioners as on 30.9.1996 was as per the particulars of claim and with interest it amounted to Rs.3,91,54,538/-. In support of their contention that the amount lent by them was by way of a loan on interest to be refunded, my attention was drawn to a letter of the Respondent-company dated 7.6.1994

which was a covering letter styled as refund of loan and payment of interest. An extract from the books of account of the Respondent-company signed by Mr.Motwani for the respondent-company giving the details of the loan account of the petitioner as on 31.3.1995, indicated the debits made to the loan account from time to time on account of repayment of principal as well as repayment of interest. This document was counter-signed by the petitioner Kunal through his partner. Yet another letter at Exh.D to the petition issued by the respondent-company related to the payment of interest and what is stated as the petitioner's "loan account with us". In the body of this letter it is also stated that there was an outstanding in the books of the respondent-company. The record indicates that the statutory notice issued by the petitioner Kunal to the respondent-company clearly indicated the aforesaid stand of the petitioner. There was no reply to this statutory notice. I am not very impressed by the reasons given on behalf of the respondent-company in one of the affidavit that the statutory notice went un-replied because the managing director of the company Mr.Motwani was required to go to Delhi to attend to the affairs of the company. Be that as it may, in the various affidavits filed on record on behalf of the respondent-company, I see absolutely no reason given as to why, in the various documents of the

respondent-company annexed to the petition and referred to here-in-above, the account of the petitioners Kunal with the respondent-company was referred to as a loan account. While admitting the receipt of money, the Respondent company has come out with the defence that there was a joint venture between the petitioner and the respondent-company. The petitioner was a nominee of Mr.Ramesh T.Khanchandani who was also a joint venturist. That the joint venture was first contemplated in the minutes of the meeting of the board of directors of the respondent-company held on 24.1.1994 at which a representative of Kunal was present. The minutes of this meeting were annexed to the further affidavit filed on behalf of the respondent-company dated 22.8.2005 and on the basis of these minutes, it was contended that 3 groups of Manhoar Makhija and his nominees would share the profits/losses on the projects @ 33%, 33% and 34% respectively. A perusal of the minutes referred to that the minutes recorded that the aforesaid shareholding groups would be entitled to interest @ 18% per month towards the loans and deposits with the company but the same will be adjusted against the final profits which will be determined on the completion of the project. Of course, the petitioner had denied that their director Shripal Dalal has attended this meeting and also denied that any such meeting has been held and also denied the contents of the minutes. Even if

this minutes are treated as true & correct, in my view, the same clearly provide that 18% interest per month was payable on the loans and deposits made by the participants of the company. The question of adjustment would only arise at the stage of calculation of final profits on the determination of and the completion of the project. This view is supported by the fact that, in fact, 18% interest per month was actually paid by the respondent-company. It was sought to be contended that 18% interest was paid from the advances received from some flat owners. I find nothing in this minutes to support the contention that interest was payable only upon the making of profits or that adjustments could be made prior to the completion of the project. It is a company's stand that as reflected in these minutes, the board had decided that the understanding arrived at between 3 groups in respect of the Worli project should be reduced to writing and it was decided that Mr.D.M.Harish Advocates would prepare a draft of the agreement which may be executed by the parties, preferably before the board meeting. Reliance was then placed upon an agreement said to have been entered into between 3 private individuals i.e. K.K.Motwani, Manohar Makhija and Ramesh T.Khanchandani, said to have been drawn by Mr.D.M.Harish. It is the admitted position that neither the petitioner nor the respondent-company were parties to this

agreement and it is further the admitted position that this agreement had never been signed by Mr.K.K.Motwani in the capacity of a director or authorised officer of the company. Surprisingly, though it is contended that the director Kunal and company had attended the meeting of the board of directors of the respondent-company on 24.1.1994, Kunal and Company has not even named in this agreement as one of the nominees of the respondent-company. Reliance was placed on clause-4 of this agreement which was in the following terms :-

> "The parties hereto shall contribute or arrange such loans and funds as may be required for the purpose of paying for the property, stamp duty and other expenses and development and construction cost."

. Reliance was further placed upon clauses-9 & 10 which were as follows :-

> 9. Shri K.K.Motwani and his nominees shall bring in loans and deposits of Rs.6 crore and interest at the rate of 18% per annum will be paid by the company thereon. Shri Manohar T.Makhija and his nominees shall bring in loans and deposits of Rs.9/- crore and interests at the rate of 18% per annum will be paid by the Company, thereon. Shri Ramesh T.Khanchandani and his nominees shall bring in loans and deposits of Rs.9/- crore and interests at the rate of 18% per annum will be paid by the Company thereon."
>
> 10. Out of the sales receipts the first 2 crores to be taken equally by Mr.Khanchandani and Mr.Makhija and any

> surplus thereafter will be taken equally by all 3 partners i.e. by Mr.Motwani, Mr.Khanchandani and Mr.Makhija equally."

9. What I find from this agreement is that, at the highest, Mr.Ramesh T.Khanchandani and his nominees (who are not named) shall bring in loans and deposits of Rs.9/- crore and interest @ 18% per annum was to be paid by the company thereon. Even between the parties to the agreement, there is no mention of adjustment of this interest as against the final profits. Clause-10 of the agreement only provided for the sharing of the first 2 crores between Mr.Khanchandani and Mr.Makhija. The petitioner was to get nothing under clause-10. Even the surplus thereafter was to be taken equally by all 3 partners i.e. Mr.Motwani, Mr.Khanchandani and Mr.Makhija. There is nothing on record to show that the petitioner was in the know of the execution of this agreement. Clause-4 of this agreement, in my view did not require any person other than the parties to the agreement to arrange for loans and funds to meet the construction and related costs. In my view, this agreement can neither be binding on the company as it is not signed by anyone having authority of the company, and it certainly not binding on the petitioner who is not signatory thereto. Even on the reading of the agreement nothing is payable to nominee of the parties save and except interest @ 18% p.a. regarding which

there is no clause of adjustment against final profits. It is very clear from the terms of the agreement that it was provided that the profits would be taken by the 3 parties who have signed the agreement and thus at the highest the petitioners could only claim interest. It is true that the petitioner was alloted a share-holding in proportion to the amount deposited by him but mere allotment of shares in proportion to the amount loaned by the petitioner on interest does not carry the defence of the respondent-company any further and does not lend any support to the case of adjustment against final profits, which does not find any mention in the agreement relied upon by the respondent-company in its defence. It is then contended that this agreement was placed before the board of directors of the respondent-company in the meeting held on 28.3.1994. Holding of such a meeting is denied by the petitioner. These minutes also do not refer to the petitioners' by name. What is more important however, is that these minutes provide that all the participants shall be paid interest @ 18% per month by the Company but does not provide that the same will be adjusted against the final profits as far as the petitioners are concerned. On behalf of the respondent-company reliance was placed upon a letter dated 23.11.2004 signed by Mr.Shripal Dalal, a director of Kunal and addressed to Ramesh Khanchandani. This letter only shows that on behalf

of the petitioner an attempt was being made to dispose off the property. This letter only mentions about the share of Ramesh Khanchandani. It contains no admission that the petitioner would have any share in the profits of any joint venture. The conduct of the company in actually paying interest for over 2 years after deducting tax clearly indicates that the amounts forwarded by the petitioner were treated as loan repayable with interest by the company itself. The defence of the company is based upon the agreement which is not binding on the petitioner and hence I find that there is no substantial defence raised as against the petitioner company.

10. The other petitioner Tarachand H.Khanchandani is based on a similar footing. In his petition he has claimed that on 15.4.1994, the petitioner, upon a request of the respondent-company provided temporary financial assistance to fulfil its liability to acquire and purchase immovable property being the plot at Worli. The assistance was to the tune of Rs.4,89,000/- as enumerated in paragraph-7 of the petition. From time to time, the Company paid interest and issued documents confirming having credited various amounts after deduction of TDS. The company also confirmed that the outstanding loan account as on 31.3.1996 was Rs.4,04,18,441/-. These documents are similar to the documents as annexed in

the first petition. The defence of the respondent-company was that the petitioner Mr.Tarachand was the father of Ramesh and was also one of the nominees of Ramesh. The defence in this petition proceeded on the same lines as in the other petition. I find that in the facts of case and analysis of the documents, for the reasons stated earlier, the defence can neither be said to be substantial or genuine.

10. It was yet another contention on behalf of the Respondent-company that the petition should be dismissed because the petitioners had suppressed the joint venture agreement mentioned here-in-above. I do not find any substance in this contention. The so-called joint venture agreement is not signed by the petitioners and nothing has been shown to me that they were made aware of the existence of this joint venture agreement. The petitioners had denied that any such agreement was executed and have also denied knowledge about existence of any such joint venture agreement. In this view of the matter the judgment cited relating to dismissal of the petitions on the ground of suppression of facts are of no avail to the respondent company. It is clear from the record that the respondent-company was served with statutory notice under Section 434 (1) (a) of the Companies Act and failed to deposit the amount demanded. Yet another chance was given to

the company in respect of the dues to Kunal at the stage of admission of the said petition, but the respondent-company did not avail of this opportunity. In these circumstances, in my view, both the petitions are liable to be allowed on the ground that the company is unable to pay its debts within the meaning of Section 433(e) r/w 433 (1) (a) of the Companies Act.

11. That brings me to the question whether it is just and equitable to wind up the company. I do not accept the argument that on the question of "just and equitable", only the averments in the petition must be taken into account and the further record must be ignored. I have already made reference to the judgments cited on behalf of the petitioners which take the view that the position as obtained on the date of the final hearing of the petitions must be taken into account in order to determine whether it is just and equitable to wind up the company. The judgment cited on behalf of the respondent-company i.e. the judgment of this Court in the case of **Mahesh Enterprises (supra)** wherein this Court held that fresh pleading cannot be permitted to be raised by way of affidavit when the petition, as filed did not contain specific pleadings is distinguishable. There are clear averments in both the petitions that the petitions in spite of being shareholders, they were completely

cut off from the management and left in ignorance. It is only during the course of the hearing of this petition that facts emerged in bits and pieces and were grudgingly placed on record. The record clearly indicates that there is a variance of the stand taken on behalf of the respondent-company and the position as obtaining in the audited balance-sheets of the company. For example, in the affidavit dated 7.3.2007 of the company in Company Petition No.171/2000, a statement of funds indicating the names of the persons who had given advances for the sale of flat are given. Five persons are named as persons who had given advances for purchase of flats. (See : page 160 of the record in Company Petition No.171/2000). However, in the balance-sheet 10 persons are named as persons who have paid advances pending allotment of a flat. It was sought to be contended that the position in the balance-sheet was not accurate. This matter cannot be brushed aside lightly. The fudging of a balance-sheet is a very serious matter and the filing of a false balance-sheet is punishable under Section 628 of the Company Act with 2 years imprisonment and fine. Admittedly, even the commencement certificate for construction of the building has not been granted by the BMC till date but the balance-sheet of the company indicates the encumberance of 10 flat purchasers. The total amount received by them in the 2004 balance-sheet,

which is the latest, placed before this Court, showed the total receipt from these 10 flat purchasers as 203054908/- (See : page 86 of the compilation dated 30.11.2006 in Company Petition No.171/2000). As against this it is now contended on oath in an affidavit filed on behalf of the company that in fact, advances are given only by 5 persons. The amount of advances in the chart annexed to this affidavit is shown to be only Rs.52423936/-. It is the categorical stand of the company in its affidavit that these persons must be repaid the amount due to them in preference to the petitioners before the Court and in fact, the petitioners are duty bound to bring back amounts to enable payments to the so-called flat purchasers. I find from the record that there is no written agreement entered into with the so-called flat purchasers as mandatorily required under Section 4 of the Maharashtra Ownership of Flats Act. To a pointed question the Counsel for respondents has admitted that no such agreements had been entered into. The consideration for such sale of flats is not placed before the Court, leaving scope for making any kind of adjustments in their favour. It cannot be lost sight of that the non execution of such agreements, prima facie, would amount to an offence by the Company punishable under Section 14 of the Maharashtra Ownership of Flats of 1963 and that this offence would be a serious offence

punishable upto 3 years of imprisonment and fine. To my mind, the issue here in this case is not mere mis-management but the commission of acts which prima facie indicate the commission of serious criminal offences. The creation of liability in such a manner to my mind, is a device to deprive the petitioners of the monies paid by them to the respondent company. The record further indicates that though the plot was obtained in an auction from the income-tax department in the year 1993-94, till date, there is not even a commencement certificate in respect of the building there of. The last letter is a representation dated 10.6.1998 on behalf of the respondent-company to the finance minister asking for recession of contract and return of monies. No legal action has been initiated against the income-tax department or against the BMC which raised a claim as far back as in 1997. As stated here-in-above there is a clear dispute about what monies would be payable to whom even if recovered. The stand of the company that the so-called flat purchasers must be paid preferentially would clearly deprive the petitioners of the monies loaned by them to the respondent-company. Taking an overall view of the matter, I find that it will be just and equitable to wind up the respondent-company and to appoint an Official Liquidator so that the exact dues of the various creditors and the number and nature of the creditors can be determined and proper

and just distribution of the assets when realised can be made.

12. In the circumstances, for the reasons mentioned here-in-above, both the aforesaid petitions are allowed in terms of prayer clause-(a) with costs. It is directed that if an undertaking of an authorised director of the respondent-company is filed within a period of one week to the effect that any amount received back from the income-tax department will not be distributed or dealt with by or on behalf of the company, the Official Liquidator will not take physical possession of any asset of the company for a period of 4 weeks from today and will not advertise the winding up orders or invite claims during the aforesaid period.

(R.S.Mohite,J)